United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2101

To be argued by
E. THOMAS BOYLE

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES W. COUNTS,

Petitioner-Appellant,

-against-

UNITED STATES OF AMERICA,

Respondent-Appellee.

Docket No. 75-2101

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the reversal and dismissal of appellant's State court felony drug conviction two years after imposition of sentence herein mandates re-sentence because the District Judge considered the State court conviction in imposing the Federal sentence.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York (The Honorable John R. Bartels) entered on November 27, 1974, denying, without a hearing, appellant's pro se petition pursuant to 28 U.S.C. §2255 requesting that the sentence imposed by the late Judge George Rosling on June 26, 1972, upon appellant's conviction for robbery involving government property (18 U.S.C. §2112), be vacated and that he be re-sentenced.

The Federal Defender Services Appeals Unit of The Legal Aid Society was assigned by this Court as counsel on appeal, pursuant to the Criminal Justice Act.*

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*Appellant filed a timely pro se notice of appeal dated December 9, 1974, but thereafter took no further steps to have his appeal heard. Counsel is informed by the office of the pro se clerk of this Court that the Clerk's Office never forwarded to the pro se clerk a copy of appellant's pro se notice of appeal, as is customary, and that therefore, appellant was never sent the usual instructions as to how to proceed further in the Court of Appeals. Counsel did not become aware of this pending appeal until June 1975 after he had filed a petition on appellant's behalf pursuant to 28 U.S.C. §2255 in the United States District Court for the Eastern District of New York setting forth the same claim for relief as the pro se petition, which is the subject of this appeal. This Court assigned counsel on appeal by order dated July 17, 1975.

Statement of Facts

Appellant is incarcerated at the United States Penitentiary at Lewisburg, Pennsylvania, pursuant to a judgment of conviction rendered in the United States District Court for the Eastern District of New York (the late Judge George Rosling) on June 26, 1972. That sentence was imposed upon appellant's conviction on Indictment 70 Cr. 857, following a jury trial, on the charge of robbery of Government property (18 U.S.C. §2112).* Judge Rosling sentenced appellant to a term of ten years in prison, to be served consecutive to a State sentence appellant was then serving on a charge involving a sale of heroin. This Court affirmed the Federal conviction on appeal (United States v. Counts, 471 F.2d 422 (2d Cir. 1973) (Oakes, C.J.).

Appellant filed the instant pro se** petition pursuant to 28 U.S.C. §2255 in November 1974 requesting that the sentence imposed by Judge Rosling be vacated and that he be re-sentenced, on the ground that Judge Rosling took into consideration at sentencing here appellant's prior felony conviction in the State court involving a sale of heroin,

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*The indictment charged appellant and another with the theft of a sky marshal's revolver at John F. Kennedy International Airport on November 14, 1970.

**The petition is Document #1 to the record on appeal.

which conviction was later reversed and dismissed on appeal in May 1974 because appellant's guilt had not been established beyond a reasonable doubt. Additionally, appellant requested that he receive credit on the Federal sentence for the "almost three years" that appellant spent in State prison prior to the reversal of the judgment and dismissal of the charge.

The transcript of the sentencing proceeding in this case* reflects that the ten-year State court sentence imposed by the Supreme Court, Queens County, on March 15, 1972, after appellant's conviction for a sale of heroin, was cited in the pre-sentence report prepared by the Eastern District Probation Department and considered by Judge Rosling prior to the imposition of sentence here (S.9**). The record further reflects that defense counsel specifically informed the sentencing court that appellant was then serving a ten-year prison sentence based on that conviction (S.9-10), and requested that the Federal sentence be permitted to run concurrently with the State sentence (S.11-12). Judge Rosling rejected that request and sentenced appellant to ten years in prison, the term to be served consecutive to the ten-year State sentence appellant was

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*The minutes of the sentencing proceeding before Judge Rosling on June 26, 1972, are "B" to appellant's separate appendix.

**Numerals in parentheses preceded by "S" refer to pages of the minutes of the sentencing proceeding.

then serving (S.13).

In May 1974, almost two years after imposition of the Federal sentence, the Appellate Division, Second Department, in a written opinion,* reversed appellant's conviction for the sale of heroin on which he had been sentenced to ten years' imprisonment. People v. Counts, 44 A.D.2d 841, 355 N.Y.S.2d 644 (2d Dept. 1974). The Appellate Division went further, however, and also dismissed the indictment, on the ground that the verdict was contrary to the evidence, specifically finding, after an examination of the record, that the State had failed to establish beyond a reasonable doubt that appellant committed the crime.**

Judge Bartels denied the pro se §2255 petition, without assigning counsel and without a hearing, in a written opinion dated November 27, 1974.*** Based on consideration of the sentencing minutes as well as his own familiarity with the sentence as a member of the three-judge sentencing

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*The opinion of the Appellate Division is "C" to appellant's separate appendix.

**Appellant at all times maintained his innocence of the State drug charge, and testified in his own behalf at trial. He also called several alibi witnesses who testified that he could not have been the person involved. The opinion of the Appellate Division reflects that it did not believe that appellant ever made the sale with which he was charged. In this regard, that court gave particular credence to evidence that appellant had several peculiar scars and markings on his chest which were shown to pre-date the alleged sale and were irreconcilable with the State's evidence that no such markings or scars appeared on the person who sold the drugs.

***Judge Bartels' opinion is "D" to appellant's separate appendix.

panel, Judge Bartels concluded that Judge Rosling's ten-year sentence was founded on "the nature of the crime." While stating that "the State sentence played no part" in Judge Rosling's consideration as to the term of the sentence to be imposed, Judge Bartels noted appellant's "criminal record beginning from the time he was a minor and ending on the date of this sentence." Specifically, Judge Bartels stated:

> This Court served on the panel which passed on petitioner's sentence and has examined the minutes of his sentence and is familiar with the basis for that sentence. Both petitioner and his co-defendant were sentenced to ten years, to run consecutively to the state conviction that each was then serving. Petitioner has a criminal record beginning from the time he was a minor and ending on the date of this sentence. At the time of the imposition of this sentence, petitioner had been sentenced by the state court to a maximum term of ten years for the sale of heroin and there was also pending before the state court a charge of attempted murder and robbery in the first degree. He could have been sentenced by Judge Rosling to a maximum term of fifteen years. At the time of sentencing Judge Rosling considered, according to the minutes, the fact that petitioner was currently in custody under a state sentence. The state sentence played no part in Judge Rosling's sentence of petitioner, which was based upon the nature of the crime for which he was convicted in this Court, and the intention was to impose a sentence of at least ten years. Therefore, there is no need for resentencing under the holding of United States v. Tucker, 404 U.S. 443 (1972).
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> Appendix D at 1-2.

Relevant Dates

The following dates relate to the issue raised by this appeal:

November 14, 1970	Date of the Federal offense
September 24, 1971	Date of the State offense
March 15, 1972	Date of imposition of sentence on the State conviction
June 26, 1972	Date of imposition of sentence on the Federal conviction
January 2, 1973	Affirmance by this Court of the Federal conviction
May 20, 1974	Reversal of the judgment and dismissal of the State charge by the Appellate Division, Second Department

ARGUMENT

THE REVERSAL AND DISMISSAL OF APPELLANT'S STATE COURT FELONY DRUG CONVICTION TWO YEARS AFTER IMPOSITION OF SENTENCE HEREIN MANDATES RE-SENTENCE BECAUSE THE DISTRICT JUDGE CONSIDERED THE STATE COURT CONVICTION IN IMPOSING THE FEDERAL SENTENCE.

In May 1974, two years after appellant was sentenced on the Federal conviction in this case, the Appellate Division, Second Department, of the Supreme Court of the State of New York reversed the judgment of conviction entered on March 15, 1972, for the sale of heroin, and dismissed the indictment on the ground that the State had failed to establish appellant's guilt beyond a reasonable doubt.* People v. Counts, 44 A.D.2d 841, 355 N.Y.S.2d 644 (2d Dept. 1974).** The State conviction for selling heroin preceded the imposition of sentence on the Federal conviction, and, as is reflected by the record, was specifically considered*** by

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*New York Criminal Procedure Law §470.15(3) empowers the Appellate Division to reverse upon the facts as well as upon the law.

**The opinion of the Appellate Division is "C" to appellant's separate appendix.

***The State conviction for selling a dangerous drug was included in the pre-sentence report, and specific mention was made to this charge when defense counsel requested that the Federal sentence be permitted to run concurrently with the State sentence appellant was then serving. Judge Rosling specifically directed that the Federal sentence be served consecutively to the sentence imposed by the State court.

Judge Rosling in the imposition of sentence here. Due process of law mandates that the sentence imposed by Judge Rosling be set aside and that appellant be re-sentenced. United States v. Tucker, 404 U.S. 443 (1972); Townsend v. Burke, 334 U.S. 736 (1948); United States v. Needles, 472 F.2d 652, 657 (2d Cir. 1973); McGee v. United States, 462 F.2d 1170, 1173 (2d Cir. 1973); United States v. Malcolm, 432 F.2d 809 (2d Cir. 1970).

In United States v. Tucker, supra, the defendant had three prior felony convictions which the court had considered at sentence. During cross-examination at trial the defendant admitted having committed the criminal acts underlying each. Several years later, two of those three convictions were rendered unconstitutional because the defendant had not been afforded counsel at those proceedings. Gideon v. Wainwright, 372 U.S. 335 (1963). Tucker then sought re-sentence because the sentencing court had considered the unconstitutional convictions as a factor in imposing sentence. The Government there argued that the invalid convictions did not affect the sentence imposed because the court could consider the defendant's acknowledged criminal conduct even absent a conviction. United States v. Tucker, supra, 404 U.S. at 446. In rejecting this contention Mr. Justice Stewart, writing for the Court, stated:

> ... [W]e deal here not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded

> at least in part upon misinformation of constitutional magnitude. As in Townsend v. Burke[*] ... "This prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Id. at 471." The record in the present case makes evident that the sentencing judge gave specific consideration to the respondent's previous convictions before imposing sentence upon him.
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> Id., 404 U.S. at 447. Footnotes omitted.

The facts here present a far more compelling reason for re-sentence than those in Tucker. Unlike Tucker, appellant never acknowledged that he had engaged in the criminal conduct which was the basis of his State conviction. To the contrary, as noted in the opinion of the Appellate Division,** appellant at all times maintained his innocence

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*There the sentencing judge mistakenly relied on what he believed to be convictions but which were, in fact, acquittals. The Court reversed and remanded for re-sentence, finding a violation of due process:

> [O]n this record we conclude that...this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand.
>
> Townsend v. Burke, supra, 334 U.S. at 470-471.

**Appendix "C". The opinion of the Appellate Division reflects that appellant testified on his own behalf and called several alibi witnesses who stated that he was not at home at the time of the alleged sale. The Appellate Division particularly noted testimony by the State's chief witness, who stated that the defendant was undressed from the waist up and that she observed no unusual scars or

of the State drug charge. Therefore, unlike Tucker, appellant was sentenced based on a record of conviction for a crime he never committed.

In Tucker the Government argued that it was highly unlikely that a different sentence would have been imposed because the judge who sentenced Tucker was the same judge who denied the §2255 petition.* The Court rejected that argument, United States v. Tucker, supra, 404 U.S. at 449 n.8, and the argument has even less weight here. Although Judge Bartels was a member of the three-judge sentencing panel in appellant's case, he was not the judge who imposed sentence, and thus he is in a far more difficult position than the district judge in Tucker to make the critical determination of "whether the sentence might have been dif-

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(Footnote continued from the preceding page)

marks on his body. At trial Mr. Counts removed his shirt revealing several scars on his chest and arms, each of which was shown to have pre-dated the alleged sale.

*In Tucker the Supreme Court characterized as "callous" the Government's contention that the district court would have imposed the same sentence even if he had been aware that Tucker had been incarcerated for ten years on convictions subsequently held invalid. The same considerations as to re-sentence should apply here. Appellant was in custody for approximately thirty months for a charge on which he was subsequently exonerated. In all likelihood it was the pendency of the consecutive Federal sentence which resulted in appellant's decision not to seek bail pending the State appeal. These are factors which the district court should consider in re-sentencing appellant, especially because the transcript of the sentencing proceeding herein reflects that Judge Rosling intended that appellant receive credit for jail time not credited toward his State sentence (S.21) so long as appellant did not receive "double credit."

ferent," United States v. Tucker, supra, 404 U.S. at 448; see Ferranto v. United States, 507 F.2d 409 (2d Cir. 1974) (per curiam).

In his opinion denying the petition, Judge Bartels states that the "state sentence played no part in Judge Rosling's sentence of petitioner which was based upon the nature of the crime for which he was convicted in this Court, and the intention was to impose a sentence of at least ten years."* This conclusion is refuted by the record.

The record here reflects that the invalid prior conviction was incorporated into the pre-sentence report** submitted to Judge Rosling and specifically noted and con-

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*Although the maximum sentence to which appellant could have been sentenced here is fifteen years, it is clear that the rationale of Tucker applies to non-maximum sentence cases as well. United States v. Haynie, 474 F.2d 1051 (5th Cir. 1973); Russo v. United States, 470 F.2d 1351 (5th Cir. 1972).

**The value of the pre-sentence report in determining the appropriate sentence was explicitly recognized by the Supreme Court in Williams v. New York, 337 U.S. 241, 249 (1949):

> Under the practice of individualized punishment, investigational techniques have been given an important role.... These [presentence] reports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guesswork and inadequate information.
>
> Emphasis added.

sidered by him in directing that the Federal sentence run consecutively to the State one.*

Although Judge Bartels' opinion states that the punishment here was based solely on "the nature of the crime," this is inconsistent with the court's earlier reference to appellant's prior criminal record in attempting to justify

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*Thus it can hardly be said that the reocrd here is silent as to whether the prior drug conviction was considered in sentencing appellant. "To prevail below [the defendant] was not required to secure an affirmative finding that reliance on prior invalid convictions enhanced his sentence. He needed only to show that the sentencing judge considered constitutionally invalid convictions so that the sentence was imposed not 'in the informed discretion of a trial judge, but [was] founded at least in part upon misinformation of a constitutional magnitude.'" Mitchell v. United States, 482 F.2d 289, 291 n.1 (5th Cir. 1973), quoting from United States v. Tucker, supra, 404 U.S. at 447. Emphasis supplied by the court.

Moreover, even where the record is silent as to the reliance placed on a prior conviction later vacated, this Court has held that a remand for re-sentence is required. In McGee v. United States, supra, 462 F.2d at 246, the defendant, pursuant to a collateral attack on his conviction, succeeded in setting aside one of the four counts. Despite the fact that it was impossible to determine from the remarks of the judge at the sentencing proceeding the extent to which he had been influenced by the conviction on the count subsequently set aside, this Court nevertheless remanded for re-sentence, specifically directing that, in the event the sentence was not reduced, the reasons therefore should be set forth in the record. See also United States v. Rivera, Doc. No. 75-1109, slip opinion 4769, 4775 (2d Cir., July 14, 1975); James v. United States, 476 F.2d 936 (8th Cir. 1973); Taylor v. United States, 472 F.2d 1178 (8th Cir. 1973).

the ten-year sentence imposed here.* Moreover, this statement conflicts with long-established sentencing practice which requires that the sentencing court "individualize" sentence by considering the offender as well as the offense:

> The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.
>
> Williams v. New York, 337 U.S. 441, 449 (1949).

This Circuit has strictly adhered to this requirement that a judge "individualize" each sentence.** United States v. Schwartz, 500 F.2d 1350 (2d Cir. 1947); United States v. Baker, 487 F.2d 360 (2d Cir. 1973).

Due process of law requires that where, as here, subsequent events establish that information regarding an accused's prior record has become false, the sentence based on that information must be set aside and a new sentence entered.

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*In the memorandum decision and order dated November 27, 1974, Judge Bartels wrote: "Petitioner has a criminal record beginning from the time he was a minor and ending on the date of this sentence." Appendix "D".

**The criminal record of an accused is one of the most significant factors in determining the appropriate sentence to be imposed. United States v. Malcolm, supra, 432 F.2d at 816; United States v. Doyle, 348 F.2d 715, 721 (2d Cir.), cert. denied, 382 U.S. 843 (1965); United States v. Miller, 361 F.Supp. 825, 827 (W.D.N.C. 1973) (Craven, C.J., sitting by designation); see American Bar Association STANDARDS, SENTENCING ALTERNATIVES AND PROCEDURES, §3.3 (1968).

Should this Court reverse and remand with directions that appellant be re-sentenced, appellant respectfully requests that the case be reassigned for re-sentence by a judge other than Judge Bartels. United States v. Schwartz, supra, 500 F.2d at 1352; Mawson v. United States, 463 F.2d 29, 31 (1st Cir. 1972); United States v. Brown, 470 F.2d 285, 288-289 (2d Cir. 1972).

CONCLUSION

For the foregoing reasons this Court should reverse the order of the District Court denying the petition and direct that appellant be remanded for re-sentence on Indictment 70 Cr. 857.

Respectfully submitted,

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Certificate of Service

AUG 20 1975, 19

I certify that a copy of this notice of motion and affidavit has been mailed to the United States Attorney for the Eastern District of New York.

E. Thomas Boyle